

### REMARKS

Applicant has carefully reviewed and considered the Office Action mailed on August 1, 2003, and the references cited therewith.

Claim 1 is amended, claims 40, 44 and 68-76 are canceled; no claims have been added; as a result, claims 1-39, 41-43 and 45-67 are now pending in this application.

The amendments made herein have been to clarify the claims and are not intended to limit the scope of equivalents to which any claim element may be entitled. The amendments to the claims have support throughout the specification. No new matter has been added as a result. Applicant respectfully requests reconsideration of the above-identified application in view of the amendments above and the remarks that follow.

Claims 40, 44 and 68-76 have been canceled solely to advance the prosecution of the present application, and without prejudice to their further prosecution in an appropriately filed continuing or divisional application.

### Affirmation of Election

Restriction to one of the following inventions was required: Group I (claims 1-67) drawn to a package comprising a bag and a frangible item and Group II (claims 68-76) drawn to a method of packaging an item comprising a frangible material. As the Examiner notes, Applicant's Representative, John O'Toole provisionally elected, on July 24, 2003, to prosecute the invention of Group I. As the restriction is made final Applicant confirms the election to prosecute the invention of Group I. The Examiner has withdrawn the claims to the non-elected invention, claims 68-76.

Applicant has therefore canceled claims 68-76 without prejudice or disclaimer and, as noted above, reserves the right to later file continuations or divisions having claims directed to the non-elected invention(s).

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§102 Rejection of the Claims

Cook

Claims 1-3, 15, 27-29, 40-42, 45, 46, 47, 58, 66-77 were rejected under 35 USC § 102(a) as being anticipated by Cook et al. (U.S. Patent No. 6,233,907).

The Examiner states that Cook teaches a rectangular bag which "could" be recloseable, made from a single laminated co-extruded sheet with an oxygen barrier, a moisture barrier, a metal layer, is vacuum sealed and containing potato chips as recited in the claims.

Applicant first notes that the Office Action's comment that the bag in Cook could be recloseable is speculative at best. Cook describes the container as being a pre-formed rigid, semi-rigid or flexible container for containing an oxygen sensitive material. (See Col. 3, lines 1-3). The pre-formed container can be a gable top carton, aseptic carton, composite can, pre-formed pouch. (See. col. 4, lines 43-45). There is no indication that the container is or could be recloseable.

Cook describes a method and apparatus for triggering an oxygen scavenging component as well as a wall component in a container for holding an oxygen sensitive material. The method includes exposing the oxygen scavenging component to a source of actinic radiation at a wavelength, intensity and residence time so as to provide a dose of actinic radiation sufficient to activate the oxygen scavenging component to scavenge oxygen from the internal space of the container. Cook requires an oxygen scavenging component.

In contrast, claim 1, as amended, recites a package comprising a bag formed of a material comprising at least one layer, the bag having an exterior portion, an interior portion, an oxygen barrier and a moisture barrier, wherein the bag does not require an oxygen scavenger or an exterior carton and is vacuum-sealed at least temporarily; and an item comprising a frangible material with a crush resistance or resistance to compression no less than about 7.0 PSIA, the item being held in the interior portion of the bag, the interior portion of the bag having less than about 1ppm hexanal therein.

Cook does not teach each element of claim 1 because, for example, it does not teach a package not requiring an oxygen scavenger.

Cook does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 2-3, 15, 27-29, 40-42, 45-47, 58, 66 and 67

depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Beer

Claims 1, 2, 4, 13, 15, 27, 28, 40-47, 51-58 were rejected under 35 USC § 102(a) as being anticipated by Beer (U.S. Patent No. 6,213,645).

The Office Action states that Beer teaches a rectangular recloseable bag made from a laminated sheet with an oxygen barrier, a moisture barrier, is vacuum sealed, sealed with a pressure sensitive cold seal and a tin tie, clip or zipper closure and containing breakfast cereal as recited in the claims.

Beer describes a package fabricated from a flexible sheet material capable of being sealed for closing off the interior of the package from ambient atmosphere. The package is designed to hold a free flowing product.

Claim 1, as amended, recites an item comprising a frangible material with a crush resistance or resistance to compression no less than about 7.0 PSIA.

Beer does not teach each element of claim 1 because, for example, it does not teach a frangible material with a crush resistance or resistance to compression no less than about 7.0 PSIA.

Beer does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 2, 4, 13, 15, 27, 28, 40-47 and 51-58 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Kraft

Claims 1-4, 10, 15-17, 21, 27-32, 40-47, 51, 58 were rejected under 35 USC § 102(b) as being anticipated by Kraft Foods Inc. (WO 9812110).

The Office Action states that Kraft teaches a rectangular recloseable bag made from a single laminated sheet with an oxygen barrier, a moisture barrier, a metal layer, is vacuum sealed, held within an open container, has a semi-rigid portion and containing potato crisps, rice grains or flakes or flour.

Kraft describes a complex apparatus and method for forming sealed packages at high speeds. The process requires formation of temporary seals in the package. The sealed packages hold a comminuted or other flowable product, which is not frangible, such as roasted and ground coffee. Applicant can not find any mention in Kraft of packaging containing frangible products such as potato chips or flakes.

In contrast, claim 1 recites, in part, a frangible material.

Kraft does not teach each element of claim 1 because, for example, it does not teach a frangible material.

Kraft does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 2-4, 10, 15-17, 21, 27-32, 40-47, 51 and 58 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Anderson

Claims 1, 2, 9-12, 14, 15, 26-29, 32, 33, 41, 58 were rejected under 35 USC § 102(b) as being anticipated by Anderson (U.S. Patent No. 5,500,303).

The Office Action states that Anderson teaches an improvement over conventional potato chip packaging made from polymeric films, which would be bags. The Office Action further states that the new packaging comprises multilayer PP or PET laminate films with oxygen and moisture barriers, are transparent or opaque with a window, with a textured outer layer, applied label, having an interior structure and semi-rigid portion, the bag being filled with nitrogen and having two chambers.

Anderson discusses an oxygen barrier which can extend the shelf life of oxygen sensitive products. The barrier comprises at least inner and outer plies of a polymeric material and a substantially anaerobic space between the two or more plies. Anderson requires at least two layers.

In contrast, claim 1 recites, in part, a bag formed of a material comprising at least one layer.

Anderson does not teach each element of claim 1 because it does not teach, for example, at least one layer.

Anderson does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 2, 9-12, 14, 15, 26-29, 32, 33, 41 and 58 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Young

Claims 1, 2, 15, 40-41 were rejected under 35 USC § 102(b) as being anticipated by Young (GB 1290836).

The Office Action only references page 1, lines 10-25, 40-45, 48-55 and 70-78.

Young discusses hermetically sealed packages of foodstuffs which include eggs in the shell embedded in a container of breakfast cereal. The egg can be raw or boiled. Ham or bacon can be wrapped around the egg.

In contrast, claim 1 recites a package comprising a bag formed of a material comprising at least one layer, the bag having an exterior portion, an interior portion, an oxygen barrier and a moisture barrier, wherein the bag does not require an oxygen scavenger or an exterior carton and is vacuum-sealed at least temporarily; and an item comprising a frangible material with a crush resistance or resistance to compression no less than about 7.0 PSIA, the item being held in the interior portion of the bag, the interior portion of the bag having less than about 1ppm hexanal therein.

Young clearly does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 2, 15, and 40-41 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Croft

Claims 1, 2, 4, 9, 10, 13, 15, 29, 40, 41 were rejected under 35 USC § 102(b) as being anticipated by Croft (U.S. Patent No. 6,074,677).

The Office Action only references column 1, lines 5-18 and 27-43, column 2, lines 57-65 of Croft.

Croft discusses a vacuum packed food container having a vacuum packed inner bag and a clear or transparent outer container body. A lid, which covers an opening that leads to the interior of the inner bag, is detachably connected to the container body. When the lid is detached from the container body, the vacuum within the inner container is released. Croft requires an outer container.

In contrast, claim 1 recites, in part, a bag not requiring an exterior carton.

Croft does not teach each element of claim 1 because for example, it does not teach a bag not requiring an exterior carton.

Croft does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 2, 4, 9-10, 13, 15, 29, 40 and 41 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Ray

Claims 1-4, 16, 40, 41, 48, 58, 65 were rejected under 35 USC § 102(b) as being anticipated by Ray (U.S. Patent No. 2,370,419).

The Office Action references only col. 1, lines 1-35; col. 1, line 49 to col. 2, line 2; col. 3, lines 1-56; col. 4, lines 59-63 and col. 10 (with a reference to what appears to be line 23) in Ray.

Ray discusses a gasproof container for use with food stuffs, emergency rations, medical supplies and other commodities or articles which it is desired to maintain free from contamination with poison gases such as mustard gas and the like. Applicant can find no discussion of frangible materials in Ray.

In contrast, claim 1 recites, in part, a frangible material.

Ray does not teach each element of claim 1 because, for example, it does not teach a frangible material.

Ray does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 2-4, 16, 40-41, 48, 58 and 65 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

Ours

Claims 1, 2, 4, 12, 14, 15, 27-29, 41-50, 58 were rejected under 35 USC § 102(a) as being anticipated by Ours et al. (U.S. Patent No. 6,062,467).

The Office Action states that Ours teaches a rectangular recloseable bag made from a laminated sheet with an oxygen barrier, a moisture barrier, perforated area for opening and would also be textured, held within a carton, sealed to the dispensing portion with a peelable label and containing breakfast cereal as recited in the claims.

Ours discusses a dispensing assembly for a carton with a dispensing opening in a side wall and a separate liner therein. The optional use of a vacuum is limited to providing a sealing contact between the liner and the front panel of the pour spout.

Claim 1, as amended, recites a bag that is vacuum-sealed at least temporarily.

Ours does not teach each element because, for example, it does not teach a bag that is vacuum-sealed at least temporarily. (See, for example, col. 5, lines 45-49).

Ours does not anticipate the claims, as amended. Applicant respectfully submits that claim 1 is allowable in its present form. Since claims 2, 4, 12, 14-15, 27-29, 41-50 and 58 depend from and further define claim 1, these claims are also believed to be allowable in their present form. Notification to this effect is respectfully requested.

§103 Rejection of the Claims

Claims 5-8

Claims 5-8 were rejected under 35 USC § 103(a) as being unpatentable over Kraft Foods Inc. (WO 9812110) as applied to claims 1-4, 10, 15-17, 21, 27-32, 40-47, 51, 58 above, further in view of Giacomani (U.S. Patent No. 6,251,450). This rejection is respectfully traversed.

The Office Action asserts that Kraft teaches a potato chips bag but is silent in teaching the location of any type of premium or coupon, or two chambers, but that Giacomani teaches the conventional placement of a premium or coupon in a potato chips bag externally, internally. The Office Action concludes that it would have been obvious to modify Kraft to include a premium/coupon externally, internally or in a secondary compartment.

Applicant respectfully submits that the Office Action has not established the *prima facie* obviousness of the present claims. To establish a *prima facie* case of obviousness, three basic

criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. MPEP 2142 (citing In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir.1991)).

Furthermore, claims 5-8 are dependent claims. The additional limitations provided in dependent claims cannot by themselves be rendered obvious over the cited references if the independent claim from which it depends is determined to be nonobvious.

Kraft does not teach or suggest the claimed invention. As noted above, Kraft discusses a complex apparatus and method for forming sealed packages at high speeds. The process requires formation of temporary seals in the package. The sealed packages hold a comminuted or other *flowable* product, which is not frangible, such as roasted and ground coffee. Applicant further can not find any mention in Kraft of packaging containing frangible products such as potato chips or flakes.

Giacoman does not overcome the deficiencies of the primary reference. Giacoman discusses food packaging incorporating a removable prize, while solving the problem of a prize commingling with the enclosed food.

Clearly, the methods and products in the primary reference and the products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, 910 F.2d 831, 834, 15 USPQ2d 1566, 1568 (Fed. Cir. 1990), *reh'g denied*, 1990 U.S. App. LEXIS 19971 (Fed. Cir.1990). There is further no indication in either reference of any appreciation of the problem being solved by Applicant's invention.

In any case, Applicant is not claiming to be the first to include a coupon or premium externally, internally or in a secondary compartment. Applicant is the first however, to provide a package comprising a bag formed of a material comprising at least one layer, the bag having an exterior portion, an interior portion, an oxygen barrier and a moisture barrier, wherein the bag does not require an oxygen scavenger or an exterior carton and is vacuum-sealed at least



temporarily; and an item comprising a frangible material with a crush resistance or resistance to compression no less than about 7.0 PSIA, the item being held in the interior portion of the bag, the interior portion of the bag having less than about 1ppm hexanal therein, as recited in claim 1, as amended, in combination with the elements in each of claims 5-8.

The references neither independently, or combined, contain each and every element of Applicant's claimed invention. (When evaluating the scope of a claim, every limitation in the claim must be considered. In re Ochiai, 37 USPQ2d 1127 (Fed. Cir.1997).

Applicant respectfully submits that independent claim 1 and claims 5-8 which depend from claim 1, are patentably distinct from the cited references, either alone or in combination. Claims 5-8, each viewed as a whole, are not suggested by the cited references and not obvious under 35 USC § 103(a).

Claims 18-23 and 26

Claims 18-23 and 26 were rejected under 35 USC § 103(a) as being unpatentable over Beer as applied to claims 1, 2, 4, 13, 15, 27, 28, 40-47, 51-58, further in view of Bedenk (U.S. Patent No. 3,708,308). This rejection is respectfully traversed.

The Office Action states that Beer teaches breakfast cereal, but is silent in teaching biscuits, shreds, puffed pieces, etc, as recited in claims 18-23 and 26, and that Bedenk is relied on as evidence of such conventional breakfast cereal. The Office Action concludes that it would have been obvious to include such breakfast cereal since it would have been obvious to substitute one cereal form for another, including selected a pillow shaped cereal, since biscuit forms include pillow shapes.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Applicant further notes that claims 18-23 and 26 are dependent on claim 1. The additional limitations provided in dependent claims 18-23 and 26 cannot by themselves be rendered obvious over the cited references if the independent claim from which it depends is determined to be nonobvious.

Beer does not teach or suggest the claimed invention. As noted above, Beer discusses a package fabricated from a flexible sheet material capable of being sealed for closing off the

interior of the package from ambient atmosphere. The package is designed to hold a free flowing product.

Bedenk does not overcome the deficiencies of the primary reference. Bedenk discusses production of puffed ready-to-eat cereal products containing corn. Bendenk improves such production by subjecting the corn to intensive milling to increase its free starch content.

Clearly, the products in the primary reference and methods and products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra. There is further no indication in either reference of any appreciation of the problem being solved by Applicant's invention.

In any case, Applicant is not claiming to be the first to package conventional breakfast cereal having various shapes. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in each of claims 18-23 and 26.

Again, the references neither independently, or combined, contain each and every element of Applicant's claimed invention. See In re Ochiai, supra.

Applicant respectfully submits that independent claim 1s and claims 18-23 and 26 which depend from claim 1, are patentably distinct from the cited references, either alone or in combination. Claims 18-23 and 26, each viewed as a whole, are not suggested by the cited references and not obvious under 35 USC § 103(a).

#### Claim 24

Claim 24 was rejected under 35 USC § 103(a) as being unpatentable over Beer as applied to claims 1, 2, 4, 13, 15, 27-28, 40-47, 51-58, further in view of Schwab et al. (U.S. Patent No. 5,342,635). This rejection is respectfully traversed.

The Office Action states that Beer is silent in teaching marbits and that Schwab teaches that it is well known to include marbits with cereal packages. The Office Action concludes that it would have been obvious to further include marbits with the cereal of Beer since it was known that this is a pleasing variety of cereal.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Applicant further notes that claim 24 is dependent on claim 1. The additional limitations provided in dependent claim 24 cannot by themselves be rendered obvious over the cited references if the independent claim from which it depends is determined to be nonobvious.

Beer does not teach or suggest the claimed invention for all the reasons stated above. Applicant further notes that Beer solves the problem of providing a flexible package with sealed edges and easy to open mouth.

Schwab discusses puffed edible foams and high intensity microwave methods of preparation. Schwab solves the problem of providing edible foam products with extended bowl lives and high natural flavor levels.

Clearly, the products in the primary reference and the methods and products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra. There is further no indication in either reference of any appreciation of the problem being solved by Applicant's invention.

In any case, Applicant is not claiming to be the first to package marbits. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in claim 24.

Again, the references neither independently, or combined, contain each and every element of Applicant's claimed invention. See In re Ochiai, supra.

Applicant respectfully submits that independent claim 1, and claim 24 which depends from claim 1, are patentably distinct from the cited references, either alone or in combination. Claim 24, viewed as a whole, is not suggested by the cited references and not obvious under 35 USC § 103(a).

#### Claim 25

Claim 25 was rejected under 35 USC § 103(a) as being unpatentable over Beer as applied to 1, 2, 4, 13, 15, 27, 28, 40-47, 51-58, further in view of DiPoto (U.S. Patent No. 5,558,930). This rejection is respectfully traversed.

The Office Action states that Beer is silent in teaching unpopped popcorn and that DiPoto teaches both cereal and unpopped popcorn require the same barrier packaging. The Office

Action concludes that it would have been obvious to include unpopped popcorn in the package of Beer since unpopped popcorn has similar packaging requirements.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Applicant further notes that claim 25 is dependent on claim 1. The additional limitations provided in dependent claim 25 cannot by themselves be rendered obvious over the cited references if the independent claim from which it depends is determined to be nonobvious.

Beer does not teach or suggest the claimed invention for all the reasons stated above.

DiPoto does not overcome the deficiencies of the primary reference. DiPoto discusses heat sealable, high moisture barrier films produced by coextrusion and compression rolled orientation.

Once again, the products in the primary reference and the methods and products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra. Additionally, there is again no indication in either reference of any appreciation of the problem being solved by Applicant's invention.

In any case, Applicant is not claiming to be the first to package unpopped popcorn. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in claim 25.

Again, the references neither independently, or combined, contain each and every element of Applicant's claimed invention. See In re Ochiai, supra.

Applicant respectfully submits that independent claim 1, and claim 25 which depends from claim 1, are patentably distinct from the cited references, either alone or in combination. Claim 25, viewed as a whole, are not suggested by the cited references and not obvious under 35 USC § 103(a).

#### Claims 33-38

Claims 33-38 were rejected under 35 USC § 103(a) as being unpatentable over Beer as applied to claims 1, 2, 4, 13, 15, 27-28, 40-47, 51-58, further in view of Galomb (U.S. Patent No. 6,245,367). This rejection is respectfully traversed.

The Office Action states that Beer is silent in teaching that a breakfast cereal bag has two compartments, two different products or the specific water activity as recited in claims 33-38, but that Galomb teaches packaging two different products, including breakfast cereals in a two compartment bag, with two different products with certain water activities. The Office Action concludes that it would have been obvious to modify Beer and include a non-particulate product with the cereal with these water activities since this provides the convenience of eating the product from the bag.

Applicant further notes that 33-38 are dependent on claim 1. The additional limitations provided in dependent claims 33-38 cannot by themselves be rendered obvious over the cited references if the independent claim from which it depends is determined to be nonobvious.

Beer does not teach or suggest the claimed invention for all the reasons stated herein. Again, the package in Beer is designed to hold a free flowing product.

Galomb teaches a bowl bag, i.e., a flexible package for holding a product which is arranged to be opened to form a bowl to enable the product to be prepared therein and/or eaten therefrom.

Once again, the products in the primary reference and the products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra. Additionally, there is again no indication in either reference of any appreciation of the problem being solved by Applicant's invention.

In any case, Applicant is not claiming to be the first to provide a package having two compartments or food products with certain water activities. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in each of claims 33-38.

Again, the references neither independently, or combined, contain each and every element of Applicant's claimed invention. See In re Ochiai, supra.

Applicant respectfully submits that independent claim 1, and claims 33-38 which depend from claim 1, are patentably distinct from the cited references, either alone or in combination. Claims 33-38, each viewed as a whole, are not suggested by the cited references and not obvious under 35 USC § 103(a).

Claim 39

Claim 39 was rejected under 35 USC § 103(a) as being unpatentable over Kraft Foods Inc. as applied to claims 1-4, 10, 15-17, 21, 27-32, 40-47, 51, 58 above, further in view of Hellweg et al. (U.S. Patent No. 5,523,109). This rejection is respectfully traversed.

The Office Action states that Kraft teaches cereal and flour but is silent in teaching treating oat flour to prevent rancidity in oat flour containing products, but that Hellweg teaches treating oat flour to inactivate enzymes, and thus prevent rancidity in oat flour cereals. The Office Action concludes that it would have been obvious to treat oat flour to prevent rancidity since it was known [to treat] oat flour/oat flour products to inactivate enzymes in oat flour prior to processing.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Applicant further notes that claim 39 is dependent on claim 1. The additional limitations provided in dependent claim 39 cannot by themselves be rendered obvious over the cited references if the independent claim from which it depends is determined to be nonobvious.

Kraft does not teach or suggest the claimed invention for all the reasons stated above.

Hellweg does not overcome the deficiencies of the primary reference. Hellweg discusses oat flour and methods of preparation to provide improved conditioned whole grain oat flours for the improved production of whole grain ready-to-eat breakfast cereals, especially puffed cereals.

Once again, the methods and products in the primary reference and the methods and products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra. There is again no indication in either reference of any appreciation of the problem being solved by Applicant's invention.

In any case, Applicant is not claiming to be the first to provide pretreated oat flour. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in claim 39.

Again, the references neither independently, or combined, contain each and every element of Applicant's claimed invention. See In re Ochiai, supra.

Applicant respectfully submits that independent claim 1, and claim 39 which depends from claim 1, are patentably distinct from the cited references, either alone or in combination.

Claim 39, viewed as a whole, is not suggested by the cited references and not obvious under 35 USC § 103(a).

Claims 59-61

Claims 59-61 were rejected under 35 USC § 103(a) as being unpatentable over Kraft Foods Inc. as applied to claims 1-4, 10, 15-17, 21, 27-32, 40-47, 51, 58 further in view of Carlblom et al. This rejection is respectfully traversed.

The Office Action states that Kraft is silent in teaching a particular permeability as recited in claims 59-61 but that Carlblom teaches 0.013-0.05 cc per sq-in per day as recited in the claims. The Office Action concludes that it would have been obvious to modify Kraft to include this particular permeability and the recited structures of claims 59-61.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Applicant further notes that 59-61 are dependent on claim 1. The additional limitations provided in dependent claims 59-61 cannot by themselves be rendered obvious over the cited references if the independent claim from which it depends is determined to be nonobvious.

Kraft does not teach or suggest the claimed invention for all the reasons stated herein.

Carlblom does not overcome the deficiencies of the primary reference. Carlblom discusses a tinted multilayer packaging material for use as a container for products such as malt beverages.

Once again, the methods and products in the primary reference and the products in the secondary reference are fundamentally different from each other and such critical differences must be recognized. In re Bond, *supra*. There is again no indication in either reference of any appreciation of the problem being solved by Applicant's invention.

In any case, Applicant is not claiming to be the first to provide a particular permeability for a package. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in each of claim 59-61.

Again, the references neither independently, or combined, contain each and every element of Applicant's claimed invention. See In re Ochiai, *supra*.

Applicant respectfully submits that independent claim 1 and claims 59-61 which depend from claim 1, are patentably distinct from the cited references, either alone or in combination. Claims 59-61, each viewed as a whole, are not suggested by the cited references and not obvious under 35 USC § 103(a).

Claims 62-64

Claims 62-64 were rejected under 35 USC § 103(a) as being unpatentable over Ray (U.S. Patent No. 2,370,419) as applied to claims 1-4, 16, 40, 41, 48,58, 65 further in view of Bianchini et al. (U.S. Patent No. 5,487,940). This rejection is respectfully traversed.

Additionally, although the Office Action refers to Bianchini initially, the arguments are presented with reference to "Miyake et al." which is presumed to be U.S. Patent No. 5,942,342. Applicant will address both references in the arguments presented below.

The Office Action asserts that Ray teaches an oxygen barrier layer and a moisture barrier layer, but is silent in teaching the materials recited in claims 62-64, and that Miyake teaches barrier composite films for foods that have mechanical strength and provide oxygen and moisture barriers, and further include a metallized polymeric layer as the moisture barrier and polyethylene. The Office Action further states that Miyake teaches layers of aluminum oxide coated polyethylene, polyester, glass or ceramic, and a polyester seal interior of the aluminum oxide coated polyethylene layer. The Office Action concludes that it would have been obvious to include a metallized polymeric layer as the moisture barrier and a substrate of polyethylene, in addition to an oxygen barrier, antioxidants, as recited in claim 63, or even the materials recited in claim 64.

Applicant again respectfully submits that the Examiner has not established the *prima facie* obviousness of the present claims.

Applicant further notes that 62-64 are dependent on claim 1. The additional limitations provided in dependent claims 62-64 cannot by themselves be rendered obvious over the cited references if the independent claim from which it depends is determined to be nonobvious.

Ray does not teach or suggest the claimed invention. As noted above, Ray discusses a gasproof container for use with food stuffs, emergency rations, medical supplies and other



commodities or articles which it is desired to maintain free from contamination with poison gases such as mustard gas and the like.

Neither Bianchini nor Miyake overcome the deficiencies of the primary reference. Bianchini discusses an oxygen and moisture barrier metallized film structure having improved oxygen and moisture barrier characteristics. Miyake discusses barrier composite films and a method for producing same.

Once again, the products in the primary reference and the products in either of the mentioned secondary references are fundamentally different from each other and such critical differences must be recognized. In re Bond, supra. There is again no indication in either reference of any appreciation of the problem being solved by Applicant's invention.

In any case, Applicant is not claiming to be the first to provide packaging made from various materials. Applicant is the first however, to provide a package as recited in claim 1, as amended, in combination with the elements in each of claims 62-64.

Again, the references neither independently, or combined, contain each and every element of Applicant's claimed invention. See In re Ochiai, supra.

Applicant respectfully submits that independent claim 1 and claims 62-64 which depend from claim 1, are patentably distinct from the cited references, either alone or in combination. Claims 62-64, each viewed as a whole, are not suggested by the cited references and not obvious under 35 USC § 103(a).

Applicant further states, with regard to each and every one of the rejections under 35 USC 103(a) presented in the Office Action, that there is simply no suggestion in any of the primary references *as to the desirability* of providing the additional element(s) suggested by the Office Action from the secondary reference. There is further no indication in any of the cited references of any appreciation of the problem being solved by Applicant's invention. When a person, having the references before him and not cognizant of Applicant's disclosure, would not be informed that a problem (solved by Applicant's claimed invention) ever existed, such references (which never recognized the problem) *could not have suggested its solution*. Combining references in this manner is improper. In re Shaffer, 229 F.2d 476, 108 USPQ 326, 329 (CCPA 1956). Focusing on the obviousness of substitutions and differences instead of on the

invention as a whole is a legally improper way to simplify the difficult determination of obviousness. Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 231 USPQ 81, 93 (Fed. Cir. 1986).

It has also been established that the Office Action must provide specific, objective evidence of record for a finding of a suggestion or motivation to combine reference teachings and must explain the reasoning by which the evidence is deemed to support such a finding. In re Sang Su Lee, 277 F.3d, 1338, 61 USPQ2d 1430 (Fed. Cir. 2002). The various statements in the Office Action that it would have been obvious to modify the primary reference and include an element from the secondary reference are conclusory statements of subjective belief. (e.g., "It would have been obvious to modify Kraft to include a premium/coupon externally, internally or in a secondary compartment.") Conclusory statements do not adequately address the issue of motivation to combine. In re Sang Su Lee, *supra*. Essentially, the current invention has been used as a roadmap to identify the purpose leading one to make the combinations noted in the Office Action. The Office Action has not provided objective evidence of a suggestion or motivation to combine the references for any of the combinations noted, and these rejections should be withdrawn.

An additional requirement of the *prima facie* case is that the *references must teach or suggest all the claim limitations*. Since all of the elements of the claims are not found in the references, Applicant assumes the Examiner is taking official notice of the missing elements from an undisclosed source. Applicant respectfully objects to the taking of official notice, and pursuant to MPEP 2144.03, Applicant traverses the assertion of official notice and requests that the Examiner cite a reference that teaches the missing element. If the Examiner cannot cite a reference that teaches the missing element, Applicant respectfully requests that the Examiner provide an affidavit that describes how the missing element is present in the prior art. If the Examiner cannot cite a reference or provide an affidavit, Applicant requests withdrawal of the rejections and reconsideration and allowance of the claims.

AMENDMENT AND RESPONSE UNDER 37 CFR § 1.111  
Serial Number: 09/945318  
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### CONCLUSION

Applicant respectfully submits that the claims are in condition for allowance and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's attorney at (515) 233-3865 to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743

Respectfully submitted,

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By their Representatives,

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Date NOVEMBER 3, 2003

By Barbara J. Clark  
Barbara J. Clark  
Reg. No. 38,107

CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail, in an envelope addressed to: Commissioner of Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this 3 day of November, 2003.

Tina Kohut  
Name

Z. U.  
Signature

## SUPPLEMENTAL INFORMATION DISCLOSURE STATEMENT

Serial No :09/945318

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Title: PACKAGE AND METHOD

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Dkt: 869.021US1

The Examiner is invited to contact the Applicants' Representative at the below-listed telephone number if there are any questions regarding this communication.

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